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In the Supreme Court of the United States

OCTOBER TERM, 1979

THE STATE OF MONTANA, ET AL., PETITIONERS

v.

THE UNITED STATES OF AMERICA AND
THE CROW TRIBE OF INDIANS, MONTANA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES

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BRIEF FOR THE UNITED STATES

QUESTIONS PRESENTED

1. Whether the bed of the Big Horn River within the exterior boundaries of the Crow Indian Reservation is held in trust by the United States for the Crow Tribe, or, rather, is owned by the State of Montana.

2. Whether the banks of the Big Horn River (between high and low water mark) are held in trust by the United States for the Crow Tribe, or, rather, belong to the owners of the riparian uplands.

3. Whether Crow Tribal Ordinance 74-05, as modified by the court of appeals, is a valid exercise of tribal authority.[1]

[1] Petitioners in their brief present nine separate questions for review. Questions 1 through 5 are rephrased in our Questions 1 and 2, while petitioners' Questions 6, 7 and 8 are included in our Question 3. We do not address petitioners' Question 9—whether the court of appeals violated Rule 52(a) of the Federal Rules of Civil Procedure.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 2–26) is reported at 604 F.2d 1162. The opinion of the district court (Pet. App. 27–55) is reported at 457 F. Supp. 599. An earlier opinion of the court of appeals in a related case, *United States* v. *Finch* (Pet. App. 56–82), is reported at 548 F.2d 822, and the opinion of this Court vacating that decision is reported at 433 U.S. 676.

JURISDICTION

A modified opinion on rehearing (Pet. App. 2) and an opinion on petition for rehearing (Pet. App. 24) were entered by the court of appeals on September 20, 1979. The petition for a writ of certiorari was filed on January 21, 1980, and granted April 14, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTES AND TREATIES INVOLVED

The statutes and treaties involved are set forth in the appendix to the petition (Pet. App. 83–120). Additional relevant statutes are set out in the petition (Pet. 4–6).

STATEMENT

1. About four hundred years ago, the ancestors of the Crow Tribe began a migration from the Winnipeg Lake Country through what is now North Dakota, and back to Canada. In the Seventeenth Century, the Tribe recrossed the border to an area encompassing the present Crow Reservation in Southeastern Montana (I J.A. 35–38). By the time the Crow arrived in the Big Horn Valley and surrounding territory, they had adapted to a Great Plains culture (I J.A. 39). Like the Sioux, their traditional enemy, the Crow subsisted mainly by hunting buffalo. In times of scarcity they supplemented their diet with fish (*ibid.*; see also I J.A. 90, 97).

In 1825 the Crow and the United States entered into a treaty of peace and friendship by which the Crow recog-

nized the supremacy of the United States (II J.A. 26, 7 Stat. 266). Warfare between the Sioux, the Crow, and other Tribes, led to the First Treaty of Fort Laramie of 1851 (Pet. App. 83–87, 11 Stat. 749). The seven signatory Tribes agreed to a definition of their several "territories," in the case of the Crow, some 38 million acres, including the entire watershed of the Big Horn River. See Royce, *Indian Land Cessions in the United States*, in [1896–1897] Eighteenth Annual Report of the Bureau of American Ethnology pt. 2, pls. CXLVI, CLXXIII, Areas 398, 399, 517, 619, 635; Appendix, *infra*. However, each of the Tribes expressly preserved "the privilege of hunting, fishing, or passing over" the entire area confirmed as Indian country (Pet. App. 86).

After the Civil War, settlers, miners, and hunters began to encroach on the Crow's territory. In due course, there followed the Second Treaty of Fort Laramie in 1868 (Pet. App. 88–96, 15 Stat. 649), by which the Crow ceded all but approximately eight million acres, formally "set apart" as the "permanent home" of the Tribe (Arts. 2, 4, Pet. App. 89, 90). The Treaty defined the Reservation as follows (Art. 2, Pet. App. 89):

> * * * [The] district of country * * * commencing where the 107th degree of longitude west of Greenwich crosses the south boundary of Montana Territory; thence north along said 107th meridian to the mid-channel of the Yellowstone River; thence up said mid-channel of the Yellowstone to the point where it crosses the said southern boundary of Montana, being the 45th degree of north latitude; and thence east along said parallel of latitude to the place of beginning * * *.

Article 4 of the Treaty (Pet. App. 90) reserved to the Crow the right to hunt and fish on the unoccupied lands of the United States as long as game could be found there and peace prevailed. Although the Treaty did not explicitly refer to hunting and fishing rights on the Reservation proper, Article 2 guaranteed the Crow the "absolute and undisturbed use and occupation" of the lands so reserved, the United States "solemnly" undertaking to

permit "no persons" (other than government agents or the Tribe's invitees) "to pass over, settle upon, or reside in" the Reservation (Pet. App. 89–90).

Subsequently, Congress further diminished the Crow Reservation to its present size—2,282,764 acres (Pet. App. 5).[2] At present, approximately 52% of the Reservation land is allotted to members of the Tribe and held in trust; 17.3% is held in trust for the Tribe as a whole; less than one percent is owned by the United States in fee; two percent is owned by the State; and 28% is owned in fee by individuals (Pet. App. 5; Pltf. Ex. 1).

2. In 1957, the United States condemned certain Reservation lands bordering the southerly portion of the Big Horn River for the construction of Yellowtail Dam and its reservoir. The regulated releases from the reservoir created for the first time conditions favorable to the existence of what is now a thriving trout fishery.[3] With the trout came fishermen—an estimated 6,800 in 1973 alone, the great majority of whom were non-Indian residents of Billings and the surrounding area (II J.A. 23–26, Pltf. Ex. 30). This influx was abetted by the State of Montana which acquired two tracts of land on the Big Horn to provide its citizens fishing access to the river (I J.A. 11, Pre-

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[2] See 22 Stat. 42 (1882); 26 Stat. 1039–1040 (1891); 33 Stat. 352 (1904); 50 Stat. 884 (1937). And see Appendix, *infra*.

[3] Previously, trout fishing was virtually non-existent on the Big Horn since trout depend upon a clear, cool, and consistent supply of water for their survival. The trout do not migrate off the Reservation since the water quality degrades quickly as the River flows northerly to its confluence with the Yellowstone (Tr. 209; F&G Ex. 95 at 14–19 of substantiating report; F&G Ex. 83 at 10; F&G Ex. 84 at 10; F&G Ex. 85 at 9). "F&G Ex." refers to the exhibits of the Montana Fish and Game Commission; "C.T. Ex." refers to the exhibits of the Crow Tribe.

The River remains less than conducive to spawning and, accordingly, trout must be stocked. Pursuant to a 1970 agreement between the Tribe and the Department of Interior's Bureau of Sport Fisheries and Wildlife, a federal fish biologist stationed in Hardin, Montana, just off the Crow Reservation, oversees the Tribe's fish stocking program on the Reservation (Pet. App. 38; Tr. 66–69). Prior to the closing of the Big Horn, the State took the lead in stocking it.

trial Order—Agreed Facts). The instant lawsuit arose out of the Crow's efforts to control this exploitation of the Tribe's natural resources.

Although the construction of the Yellowtail Dam was, in petitioners' words, the "catalyst for this litigation" (Pet. Br. 11), the issue whether non-Indians may hunt and fish on the Crow Reservation has troubled the Tribe and the United States for as long as there has been a Reservation. In 1873, Blackfoot, a Crow Chief, complained of "whites that are coming into [Crow] country and going into Judith's Basin, eating the game" (III J.A. 144–145, C.T. Ex. 74), and of "whites kill[ing] [buffalo] and put[ting] poison on them to kill wolves" (III J.A. 146, C.T. Ex. 74). On both counts, the Government's representatiave recommended measures to end the encroachments (II J.A. 106–107, 114–115, C.T. Ex. 74). From 1912 to 1923, the Superintendent of the Crow Agency and the Commissioner of the Bureau of Indian Affairs exchanged a series of letters (Pltf. Exs. 6, 9, 11–17, 19–20, 22–27) reflecting the Crow's opposition to whites hunting and fishing on the Reservation. Although the position of the United States was, on occasion, equivocal (*e.g.*, Pltf. Exs. 14, 19, 20, 24), the Tribe consistently and forcibly expressed its belief that non-Indians had no right to hunt and fish there (*e.g.*, Pltf. Exs. 12, 19). During this period the Tribe petitioned the United States to place "strict limitations" on outsiders to "conserve the game and fish upon the Crow Indian Reservation" (II J.A. 1, Pltf. Ex. 18), and passed a resolution expressing "the sense of the [Tribal] Council that no more hunting and fishing by parties who are not members of the Crow Tribe be allowed within the boundaries of the * * * Reservation" (Pltf. Ex. 21 at 24).

In both 1954 (Resolution No. 23, C.T. Ex. 71–o) and 1957 (Resolution No. 149, C.T. Ex. 71–a), the Crow Tribal Council—the entire adult membership of the Tribe—closed the Reservation to hunting and fishing by non-members, although the 1957 resolution instituted a fishing permit system. On August 11, 1961, the Crow Tribal Council

passed Resolution No. 62–02–A making it "unlawful for any person, except members of the Crow Tribe, to hunt, fish or trap within the exterior boundaries of the Crow Indian Reservation" (II J. A. 75, C.T. Ex. 71–i). This prohibition continued until September 17, 1966 when the passage of Ordinance No. 67–1 (C.T. Ex. 71–r) made it lawful for non-members to hunt on the Reservation except in the mountain areas and to fish with a tribal permit. See also Resolution No. 64–20 passed November 16, 1963 (II J. A. 78–82, C.T. Exs. 71–k, 71–l, 71–m).

On October 13, 1973, in its quarterly "town meeting," the Crow Tribal Council enacted Resolution No. 74–05 (Pet. App. 119–120), reciting the Tribe's concern that food prices were rising, tribal membership was growing, and the Reservation's supply of game and fish was dwindling. In light of these conditions, and in order "to help alleviate the game and fish shortage and to help the economic condition of the Crow people" (Pet. App. 119), the Tribe determined to withdraw the permission previously granted non-Indians to hunt and fish on the Reservation. In transmitting the resolution to his Area Director, the Superintendent of the Crow Agency of the Bureau of Indian Affairs described the conditions and problems that led to its enactment (II J. A. 86–90, C.T. Ex. 71–qq):

> The resolution to disallow hunting and fishing on the Crow Indian Reservation expresses the feelings of the Crow people with regard to the ever increasing pressure on reservation game and abuse of hunting and fishing privileges. The tribe's desire to close the entire reservation reflects the grave concern of its members over the erosion of one of the most valued resources and hereditary rights. This office is convinced that the Crows concerns are well founded and that under existing circumstances their action is timely and fully justified. * * *
>
> 1. Hunting pressure on the reservation has increased to a point where game is depleted or non-existent in vast areas.* * *
>
> 2. Regulation of hunting and fishing has become increasingly uncontrollable with the general public

taking advantage of situations beyond the Crow Tribes' ability to control.* * *

3. Actions by the State of Montana and the National Park Service indicate that their unannounced policies are directed toward the development of the entire Crow Indian Reservation for hunting and fishing including the Tribal lands of the Big Horn Mountains, and without regard to the desires of the Crow Tribe of Indians. * * * The press of public opinion to open the entire reservation to hunting and fishing is overwhelming, except for the resistance of the Crow Indians.

4. Regulation of hunting and fishing on the reservation is ineffective under present conditions.* * *

a. The general public has taken advantage of interspersed fee and Indian trust lands to utilize the whole reservation without respect to land status * * *.

b. The permit system in force prior to this resolution brought in revenue estimated at $8,000. The FY 1972 Tribal Program spent $19,500 for Game Wardens and the FY 1973 Program has set up $95,000 for this purpose. * * *

c. * * * Enforcement by the [S]tate [of Montana] is only token to say the least and the [S]tate does not even give the appearance of recognizing that there is a problem.

d. The State of Montana has opened a big game season on Big Horn Lake which includes deer and elk. * * * The Crows sold [this] land to the federal government for the sole purpose of building a dam and reservoir. It was not the understanding that big game hunting would be permitted in this area.

The Crow Tribe employs a force of eight game wardens to enforce Resolution No. 74–05, some of whom are commissioned as federal police officers through the Bureau of Indian Affairs (Tr. 249–253). The tribal game wardens patrol the Reservation by land, in the air and on water (Tr. 253, 258). In contrast, the State of Montana has one game warden assigned to an area of which the Crow Reservation is merely a part (Tr. 311–313, 331).

3. The United States filed this action on October 9, 1975, seeking a judgment declaring that the United States holds title to the bed and banks of the Big Horn River within the exterior boundaries of the Crow Reservation in trust for the Crow Tribe and that the Tribe enjoys exclusive authority to regulate hunting and fishing within the Reservation. The case paralleled *United States* v. *Finch*, 395 F.Supp. 205 (D. Mont. 1975), a criminal prosecution under 18 U.S.C. 1165 originating in the same district court, to ensure that the like issues there presented would be decided if the prosecution failed on other grounds. As it happens, the district court in *Finch*, *supra*, declared that the bed of the Big Horn River belonged to the State of Montana and that Finch, a non-Indian, therefore could not be convicted of trespassing upon Indian-owned land by fishing on the Big Horn River within the Reservation. The court of appeals reversed, 548 F.2d 822 (9th Cir. 1976) (Pet. App. 56–82), concluding that the bed and banks of the Big Horn River within the Crow Reservation were trust lands held by the United States for the Crow Tribe. But this Court summarily reversed on double jeopardy grounds, 433 U.S. 676 (1977), without referring to the other issues. The present case was then pursued.

On July 31, 1978, the district court, adhering to its *Finch* decision, held that: (1) title to the riverbed and banks is in the State of Montana; (2) the State has exclusive jurisdiction to regulate non-Indian hunting and fishing on fee patented lands on the Reservation; (3) the State and the United States, pursuant to 18 U.S.C. 1165, have concurrent jurisdiction to regulate non-Indian hunting and fishing on trust lands within the Reservation; (4) the Crow Tribe's exclusive right to hunt and fish on its Reservation is restricted to trust lands; and (5) the Tribe's regulatory authority on the Reservation is limited to the right to grant or withhold permission to non-Indians to trespass upon trust lands for the purpose of hunting and fishing (Pet. App. 54–55).

On appeal, the Ninth Circuit reversed, and again ruled that the bed and banks of the Big Horn River are held in trust by the United States for the Crow Tribe; that the

Tribe can prohibit non-resident non-Indian hunting and fishing on all lands on the Reservation; but that the Tribe cannot prohibit non-Indian residents from hunting and fishing on their own lands within the Reservation, although they can be made subject to non-discriminatory tribal regulation. The court went on to hold that Montana may regulate non-Indian hunting and fishing on the Reservation so long as State regulation does not interfere with the tribal regulatory program. In effect, the non-Indian is bound to observe the stricter of the two sets of regulations. Finally, the court held that the State cannot regulate directly or indirectly hunting and fishing by members of the Tribe on the Reservation.

The United States filed a motion for reconsideration on three issues: the tribal power to regulate non-member hunting and fishing; the availability of civil forfeiture as a tribal enforcement mechanism; and the existence vel non of concurrent state jurisdiction over non-member hunting and fishing. The petitioners also sought reconsideration, asserting that *Wilson* v. *Omaha Indian Tribe*, 442 U.S. 653 (1979), required the application of state law to define the extent of federal patents of land riparian to the Big Horn River. The amended opinion of the court of appeals (Pet. App. 2) denied both petitions for rehearing. See also Pet. App. 24.

SUMMARY OF ARGUMENT

I

It can no longer be doubted that the United States had the *power* to alienate or reserve to itself for a public purpose the bed and banks of navigable waters that otherwise would pass to the State upon its entry into the Union. And it has been long since settled that among such public purposes is the setting aside of land for the use and occupancy of Indian Tribes. The only question, in each case, is whether the United States *intended* to appropriate or convey the submerged land before statehood.

Where Indian Tribes are involved, an affirmative answer is implicit in the very nature of the grantee. The sovereign character of Indian Tribes, particularly as seen

during the treaty period when they were approached as "Nations", and the solemn commitment of the United States to guarantee the integrity of their "territory", strongly suggest that it was mutually recognized that Indian Tribes were to exercise complete dominion over all land within their borders, not excluding river bottoms. It would be odd indeed to conclude otherwise—that navigable waters wholly surrounded by reservation lands were intended to be excluded from the grant—in view of the common practice of fixing the boundaries of reserved lands at the middle or mid-channel of navigable rivers rather than at the nearer bank. In the instant case, when in 1868 the Crow Tribe ceded to the United States much of the territory previously set aside for it in the First Treaty of Fort Laramie, the new northern border of the Crow Reservation was fixed along "the mid-channel of the Yellowstone River." Since the Tribe gained no new territory by the agreement, the cession of half of the Yellowstone reflects the view of the parties that all of it formerly belonged to the Tribe. *A fortiori*, it must have been understood that the Crow held the bed of the lesser "internal" Big Horn River, once completely surrounded by their lands. Any other conclusion would violate settled rules of construction for Indian treaties, especially where the Tribe was retaining all rights not expressly ceded.

This approach is supported by the uniform course of decisions in the lower courts, and is consistent with the rulings of this Court. On analysis, *United States* v. *Holt Bank*, 270 U.S. 49 (1926), is no exception. That case involved an area as to which the title of the Tribe had not been recognized before statehood, a plainly distinguishable situation.

II

Petitioners' claim that the State of Montana owns the banks of the Big Horn, between low and high water mark, presses too far the role of state law. If, as we submit, the bed of the River was, prior to statehood, effectively reserved for the Crow Tribe, then the banks were as well. Similarly, if we are wrong, both passed to Montana upon

its entry into the Union. Any other conclusion would lead to absurd results. The question remains whether the banks, subsequent to their reservation for the Crow, were conveyed to the State. Certainly Montana could not accomplish this result unilaterally. Nor did the federal patents to riparian tracts, for the general rule is that where federal patents convey uplands adjacent to navigable waters, no part of the bed or banks is included. In the present context, there is no justification for "borrowing" state law to vary the federal rule.

III

The Crow Tribe's claim to an exclusive fishery on the Big Horn River is justified on grounds other than the Tribe's ownership of the bed. It is conceded that the Crow once had an exclusive right to hunt and fish on all lands and in all rivers within the exterior borders of the Reservation. We submit that that property right continues, that it is not necessarily tied to land ownership, and that it has not been substantially diluted by the now-repudiated allotment policy that led to the alienation of various tracts of land within the Reservation. We accept as a permissible accommodation the court of appeals' conclusion that the Allotment Acts impliedly promised the white settler who purchased land within the Reservation that "bagging of game from his front step [would not be] subject to permission of the Crow Tribal Council." However, we resist the expansion of this exception to other areas of the Reservation, including the Big Horn River, and to non-residents who can claim no "justifiable expectation" to share in the Reservation's resources. Nor can the State's purchase of a "wedge" of land within the Reservation justify an open invitation to all comers to hunt and fish without tribal permission.

Finally, we stress that, "proprietary" rights aside, the Crow Tribe enjoys a measure of governmental authority over Reservation activities. In our view, the residual sovereignty of the Tribe over its territory includes power to regulate, in a reasonable and non-discriminatory manner, hunting and fishing by resident non-members, and to exclude (or admit on conditions) outsiders who have no

connection with the Reservation. In this respect, Indian Tribes are unique, still retaining the prerogative to close their borders against all those who can claim no invitation to enter. At all events, we note that the decision of the Crow Tribe to exclude non-resident hunters and fishermen is a reasonable measure to protect threatened Reservation resources.

ARGUMENT

I. THE BED OF THE BIG HORN RIVER

It may be asked how and why a controversy has arisen over the ownership of the bed and banks of the portion of the Big Horn River that remains within the Crow Reservation when, so far as appears, no party to the case has sought to extract minerals or sand or gravel or other material from the river bottom (compare *Choctaw Nation* v. *Oklahoma*, 397 U.S. 620, 621 (1970)), nor otherwise to disturb the bed or banks (compare *United States* v. *Holt Bank*, 270 U.S. 49, 52–54 (1926)). The answer is that all parties, and both courts below, have assumed that ownership of the riverbed determines—in large measure, if not entirely—the respective proprietary and jurisdictional claims of the State and the Tribe to fishing rights in the Big Horn River, and to license and regulate the taking of fish by others, as well as the accountability of non-Indians fishing there without tribal permission to federal prosecution under 18 U.S.C. 1165.[4]

In fact, there are independent bases for the Tribe's assertion of fishing rights in the River,[5] and non-Indians

[4] As noted in the Statement (*supra*, page 6), the United States instituted the present action to "parallel" the *Finch* case, in which the Tribe's beneficial ownership of the bed of the River was treated as a prerequisite to federal jurisdiction under Section 1165. See Pet. App. 64–65. Accordingly, the complaint here expressly prayed that the title of the United States, holding on behalf of the Tribe, be quieted to so much of the bed of the Big Horn River as remains within the boundaries of the Crow Reservation. Paras 3, 6, prayer (d), R. 1–2, 5–6.

[5] Indeed, the Tribe contends that it retains, on behalf of its members, an exclusive right to hunt and fish throughout the Reservation, except on posted fee land, and, at all events, enjoys full regulatory authority over hunting and fishing within Reservation boundaries, regardless of land ownership. See pages 30–40, *infra*.

elsewhere have advanced alternative arguments.[6] But, under the issues framed here, the Tribe's ownership of the bed and banks of the River puts beyond challenge the tribal claim to an exclusive River fishery and the right of the Tribe to prohibit non-members from fishing in that stretch of the Big Horn, or to license and regulate such fishing, as it prefers. That is reason enough to focus on title to the *solum*, a point squarely decided below and expressly presented here by the petition for certiorari,[7] albeit decision of that question adversely to the Tribe will not foreclose its claims with respect to fishing or fishing regulation.[8]

1. There is no longer any question of the *power* of the United States, before statehood, to alienate or reserve to itself the bed and banks of navigable waters, at least so long as it is done for a public purpose. As this Court said almost a century ago in *Shively* v. *Bowlby*, 152 U.S. 1, 48 (1894):

> We cannot doubt, therefore, that Congress has the power to make grants of lands below high water mark of navigable waters in any Territory of the United States, whenever it becomes necessary to do so in order to perform international obligations, or to effect the improvement of such lands for the promotion and convenience of commerce with foreign nations and among the several States, or to carry out other public purposes appropriate to the objects for which the United States hold the Territory.

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[6] Thus, in *Finch* it was argued that the State, as riparian owner, enjoys, for the benefit of all its citizens, a right to fish in the river. See Pet. App. 76–77.

[7] By contrast, the State's claim as riparian owner of the upland was not presented in the petition and is not before the Court, except as to any "banks" between high and low water mark. See Pet. 3–4.

[8] See note 5, page 11, *supra*. Moreover, by faulting the Tribe's prohibitory ordinance only as applied to "non-members who reside on fee patent lands within the Reservation" when "hunting and fishing on tracts on which they reside" (Pet. App. 15), the decision below permits the Tribe to reserve to its members fishing on the Big Horn River. The United States and the Tribe are free to defend that result on the alternative ground that the Tribe enjoys exclusive fishing rights there, or at least authority to exclude outsiders, regardless of the State's ownership of the bed. See pages 30–40, *infra*.

To be sure, in the same case, the Court spoke of such grants as justified only "in case of some international duty or public exigency" (*id.* at 50), and that language, repeated in later decisions (*e.g.*, *United States* v. *Holt Bank*, *supra*, 270 U.S. at 55), is much stressed here. But a reading of the opinion as a whole makes clear that "public exigency" is used in contrast to "piecemeal" dispositions "to individuals as private property" (152 U.S. at 50), and means no more than "other public purposes appropriate to the objects for which the United States hold the Territory" (*id.* at 48). Although in *Brewer-Elliott Oil & Gas Co.* v. *United States*, 260 U.S. 77, 85–86 (1922), the Court formally reserved the question whether vesting ownership of a navigable river bed in an Indian Tribe is such a purpose, it may fairly be said that little doubt was left that the answer must be in the affirmative. Indeed, the matter had been effectively so resolved four years earlier in the context of the Territory of Alaska (*Alaska Pacific Fisheries* v. *United States*, 248 U.S. 78, 87–88 (1918)), and the Court now expressly noted that "the declared purpose of the Louisiana Purchase Treaty with France that statehood should be ultimately conferred on the inhabitants of the territory purchased * * * [does not] var[y] at all the principles to be applied in [the] case." 260 U.S. at 85.

Thus, when the *Holt Bank* case came to be decided here, it went unquestioned that the United States might, before statehood, have reserved the bed of a navigable lake for the benefit of an Indian Tribe, the only issue being one of intent. 270 U.S. at 54–55, 58. And, finally, in *Choctaw Nation* v. *Oklahoma*, *supra*, 397 U.S. at 633, the Court characterized that rule as "well settled," stressing that the only arguable question was "whether the United States intended to convey title to the river bed" to the Indian Tribes involved.

2. If the power to withhold navigable water bottoms from the State be conceded, it is nevertheless urged that there is a strong presumption against it. We suggest, however, that the force of the presumption varies according to the character of the claimant and the purpose behind the transaction which is said to embrace the bed of a

navigable water body. Indeed, it is not without significance that the rule derives from cases in which the allegation of a grant to water bottoms was advanced by an individual or private corporation. That was the situation in *Packer* v. *Bird*, 137 U.S. 661 (1891), where the claim was rejected because the grant did not "in terms embrace[] the land under the waters of the stream." *Id.* at 672. And it was in a like context that those words were repeated in *Shively* v. *Bowlby*, *supra*, 152 U.S. at 48.

On the other hand, a very different approach has been taken—with one seeming exception—in cases where the claim was that the bed of navigable waters was included in a grant to a quasi-sovereign Indian Tribe. *Donnelly* v. *United States*, 228 U.S. 243, 259 (1913); *Alaska Pacific Fisheries* v. *United States*, *supra*, 248 U.S. at 87–90; *Brewer-Elliott Oil & Gas Co.* v. *United States*, *supra*, 260 U.S. at 87; *Choctaw Nation* v. *Oklahoma*, *supra*, 397 U.S. at 630–636. Insofar as *Holt Bank* relied on a presumption (but see *Choctaw Nation*, *supra*, 397 U.S. at 634), it stands alone and must be explained by the special circumstances there deemed controlling—as we detail in a moment (pages 18–22, *infra*).

It requires no elaborate argument to justify the different approaches. The piecemeal grants of river bottom to individual proprietors along a navigable stream constitute private privileges, in derogation of public rights; in the usual case, they further no public purpose and, if made only in particular instances, amount to discriminatory favoritism. No such characterization can fairly be given to the inclusion of water bottoms in a large territory set aside for an entire Tribe, confirmed as part of its aboriginal domain or granted in exchange for the ceded homeland. Not only does such an action plainly serve a public purpose, peculiarly within federal responsibility (see *Alaska Pacific Fisheries* v. *United States*, *supra*, 248 U.S. at 88), but the sovereign character of the Tribe and the communal interest of all members (see *Washington* v. *Fishing Vessel Ass'n*, 443 U.S. 658, 677–679 (1979)) make it perfectly natural to concede the navigable waters within the boundaries of the territory as included. Especially was

this so during the treaty period, when Indian Tribes were commonly termed "Nations" and viewed as sufficiently independent powers to justify the negotiation of solemn agreements with them, by which the United States guaranteed the integrity of their "territory," typically confirmed by requiring the later admitted State to disclaim all proprietary and governmental rights there.

It is no objection that the United States normally retains legal title to the lands of Indian Reservations. We deem it beyond argument that the federal government, acting during the territorial period, could withhold from the future State the beds of navigable waters equally by withdrawing the area and dedicating it to a special public purpose as by alienation to others. *E.g.*, *United States* v. *Alaska*, 423 F.2d 764 (9th Cir. 1970). So long as the United States maintains the enclave as segregated from the public domain, State claims cannot cross the boundary, save by consent. The rule that federal title to navigable water bottoms inures to the State upon its admission to the Union applies only to the unappropriated lands of the United States. Plainly, it can have no force within an area held in trust for an Indian Tribe, to which beneficial ownership is expressly conceded and whose interest is "property" protected against appropriation or alienation by the Fifth Amendment. See, *e.g.*, *United States* v. *Sioux Nation of Indians*, No. 79-639 (June 30, 1980), slip op. 35-36, 42-43, 50-51. To hold otherwise would be inconsistent with the original objective of most Indian Reservations established before statehood: to define an "Indian country" protected from outside intrusion, including interference by a later admitted State. Cf. *United States* v. *Kagama*, 118 U.S. 375, 381-384 (1886).

These considerations are reflected in the many instruments creating Indian Reservations expressly describing a boundary as the "middle" or "mid-channel" of a navigable river, as opposed to the nearer bank.[9] That contrasts

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[9] See, *e.g.*, Treaty of Tellico with the Cherokees of Oct. 25, 1805 (7 Stat. 93, 2 *Indian Affairs—Laws and Treaties* 82 (C. Kappler ed.

sharply with the language of private grants from the United States bordering navigable waters, but is a common feature in defining interstate boundaries. See, *e.g.*, *Texas* v. *Louisiana*, 410 U.S. 702 (1973); *New Hampshire* v. *Maine*, 426 U.S. 363 (1976). Plainly, such descriptions, whether they occur in Acts of Admission or in Indian treaties, carry the same consequence of conveying half of the bed of the stream. And the reason, we surmise, is much the same: to confirm to the "political society" involved, for the benefit of all its inhabitants, at least a share in the benefits of the stream, as part of its newly defined sovereign territory. See *Choctaw Nation* v. *Oklahoma*, *supra*, 397 U.S. at 631-632 n.8. To this, we may add, in the case of Indian Reservations, a special concern to create, where possible, a "buffer zone" that will place the nearer bank clearly off-limits to intruders—sometimes accomplished by including the whole river bed within the

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1904) (hereafter "Kappler"); see Royce, *supra*, pls. CLXI and CLXII, Area 105), setting a new boundary, defined, in part, as "up the middle of the Tennessee river (but leaving all the islands to the Cherokees)"; Report of Survey of July 1, 1863 with respect to the Sioux of the Mississippi (1 Kappler 895; see Royce, *supra*, pl. CXIX, Area 443), establishing a Reservation described, in part, as "to the middle channel of the Missouri River; thence up said channel;" Treaty of Washington with the Chippewa of the Mississippi, and Pillager and Lake Winnibigoshish bands of Chippewa of May 7, 1864 (13 Stat. 693, 2 Kappler 862), establishing a Reservation defined, in part, as "down the centre of the main channel of Red Lake River;" Treaty of Medicine Lodge Creek with the Kiowa and Comanche of Oct. 21, 1867 (15 Stat. 581, 2 Kappler 977; see Royce, *supra*, pl. CXXX, Area 510), redefining their Reservation, in part, as "down [the] north fork [of the Red River], in the middle of the main channel thereof, * * * to the main Red river; thence down said river, in the middle of the main channel thereof." And see note 12, page 18, *infra*.

A further example is the Judith Basin Reserve, set apart for the Crow by an Executive Order of January 31, 1874 (1 Kappler 859) pursuant to the Agreement of August 16, 1873 (II J.A. 111-115), and rescinded the following year (1 Kappler 859-860). Its northern boundary was defined as "the middle" of the Missouri River. See Royce, *supra*, at 864-865, 870-871, 880-881, pl. CXLVII, Area 557.

Reservation;[10] in other instances, including all except the farther shore above low water mark.[11]

Given that so commonly Indian treaties expressly include a portion of the beds of navigable streams bordering the Reservation, it would be odd to indulge a presumption against it when the description is less explicit. It is, therefore, not surprising that this Court has construed somewhat ambiguous language to encompass some part of the water bottoms adjacent to the upland boundary. See *Choctaw Nation* v. *Oklahoma*, *supra*. But it would be stranger still to presume that navigable waters wholly surrounded by Reservation lands were intended to be excluded from the grant. For, in that case, there is normally greater cause both to concede the area as appropriately belonging to the "public" of the Indian territory and to exclude the claims of any future State and its citizens.

What is more, where "inland" water bodies are involved, it would have been blatantly deceptive to the Indians to have withheld the beds and banks from a description apparently including them without a word of warning. It is wholly unreal to suppose the Indians, who accepted the protection of the United States in part *against* the intrusion of the white public and all other powers, foreign and domestic, understood that an exception must be implied for submerged lands underlying waters deemed navigable according to rules unknown to them. To read an Indian treaty or agreement as embodying such an unwritten—and unfamiliar—clause would plainly violate settled rules of construction. See, *e.g.*, *Washington* v. *Fishing Vessel Ass'n*, *supra*, 443 U.S. at 675–678 & n.22; *Choctaw Nation* v. *Oklahoma*, *supra*, 397 U.S. at 631;

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[10] *E.g.*, Executive Order of March 6, 1880, with respect to the Moses Band of the Nez Perce (1 Kappler 904; see Royce, *supra*, pl. CLXVIII, Area 618), expanding a Reservation bounded on the south by Lake Chelan, but defining the boundary as "following the meanderings of the south bank of said lake."

[11] *E.g.*, Treaty of Fort Laramie with the Sioux of Apr. 29, 1868 (15 Stat. 635, 2 Kappler 998; see Royce, *supra*, pl. CXVIII, Areas 409, 598, 632), defining a Reservation west of the Missouri, but "commenc-

Alaska Pacific Fisheries v. *United States*, *supra*, 248 U.S. at 89; *Jones* v. *Meehan*, 175 U.S. 1, 10-11 (1899).

3. It would seem to follow that, with respect to Indian Reservations established before statehood, one ought, as a general rule, to construe the description as encompassing all waters and submerged lands included within the outer boundaries, except as expressly withheld. That, indeed, has been the approach uniformly followed in a large number of lower court cases dealing with the question.[12] These decisions, adjudicating title to navigable water bottoms in favor of Indian Tribes, constitute a substantial corpus of property law which ought not lightly be disturbed. It is suggested, however, that the lower court precedents cannot overcome the force of this Court's ruling in *United States* v. *Holt Bank*, *supra*, a case which is said to apply the presumption against alienation of navigable beds held in trust for a future State in denying the claim advanced on behalf of an Indian Tribe. We now examine that argument and conclude that *Holt Bank* is, in fact, no exception to the settled rule.

A closer look at the *Holt Bank* case reveals that it has been misread. As this Court noted in *Choctaw Nation* v. *Oklahoma*, *supra*, 397 U.S. at 634, the result was not reached on a "blind" application of a presumption in favor of State ownership, but only after "examin[ing] the cir-

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ing on the east bank of the Missouri river," thence proceeding for several hundred miles "along low-water mark down said east bank."

Significantly, where no part of the river bed is intended to be included, the treaty typically fixes the boundary on the nearer bank by express words. *E.g.*, Treaty of Hopewell with the Chickasaw of Jan. 10, 1786 (7 Stat. 24, 2 Kappler 14), defining the boundary of that Nation, on the north, as "thence down the southern banks [of the Ohio River];" Treaty of Castor Hill with the Kickapoo of Oct. 24, 1832 (7 Stat. 391, 2 Kappler 365), establishing a Reservation for that Tribe west of the Missouri and defining the eastern boundary as "the west bank of the Missouri river."

[12] See, *e.g.*, *Moore* v. *United States*, 157 F.2d 760 (9th Cir. 1946), cert. denied, 330 U.S. 827 (1947) (Quillehute River and adjacent tidelands are part of the Quillayute Indian Reservation); *United States* v. *Romaine*, 255 F. 253 (9th Cir. 1919), *United States* v. *Boynton*, 53 F.2d 297 (9th Cir. 1931), and *United States* v. *Stotts*, 49 F.2d 619 (9th

cumstances in detail." And, as the *Holt Bank* opinion stresses, the circumstances there were wholly atypical.

What was in dispute was the now drained and uncovered bed of Mud Lake, once a navigable body of water within the boundaries of an area of unceded Indian lands that came to be known as the Red Lake Reservation. 270 U.S. at 52–53, 57, 58. Long before the case, most of the Reservation and all the tracts surrounding the lake had been "relinquished and ceded" by the Chippewas and sold off to homesteaders. *Id.* at 52–53. See Royce, *supra*, at 934–935, pl. CXLII, Area 706. There was thus presented the somewhat anomalous claim of title to a lake bed, far removed from the diminished Reservation and no longer serving any tribal purpose except as a source of funds from the sale of lots. In these circumstances, it is not surprising that the Court was reluctant to conclude that the lakebed was an integral part of the Reservation. Cf. Mr. Justice White, dissenting, in *Choctaw Nation* v. *Oklahoma*, *supra*, 397 U.S. at 653–654; *Puyallup Tribe* v. *Washington Game Dept.*, 433 U.S. 165, 173–174 & nn. 11, 12 (1977).

There was, moreover, another, perhaps more critical, consideration informing the decision in *Holt Bank*. That was the questionable status of the Red Lake Reservation before Minnesota became a state. Although the Court had earlier determined that the area involved should be recognized as an Indian Reservation, that was primarily on the basis of congressional and presidential actions taken long after Minnesota was admitted to the Union in 1858. *Minnesota* v. *Hitchcock*, 185 U.S. 373, 388–402 (1902). Such

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Cir. 1930) (all three cases hold that a portion of the bed of the Nooksack River is a part of the Lummi Indian Reservation); *Montana Power Co.* v. *Rochester*, 127 F.2d 189 (9th Cir. 1942), *United States* v. *Pollmann*, 364 F. Supp. 995 (D. Mont. 1973), and *Confederated Salish and Kootenai Tribes* v. *Namen*, 534 F.2d 1376 (9th Cir. 1976) (all three cases hold that the Tribes hold title to the bed of the Flathead Lake within the Reservation boundaries); *Heckman* v. *Sutter*, 119 F. 83 (9th Cir. 1902) (individual Alaskan Natives' rights in tidelands protected); *United States* v. *Finch*, 548 F.2d 822 (9th Cir. 1976), vacated on other grounds, 433 U.S. 676 (1977) (bed of the Big Horn River within Reservation boundaries is beneficially owned by Crow Tribe).

post-statehood acts, before survey, were held sufficient to defeat the State's claim to school sections in place—a grant that attaches only after survey and can be transferred to other "lieu" lands by any prior withdrawal embracing the numbered sections. *United States* v. *Wyoming*, 331 U.S. 440, 443–444 (1947); *Andrus* v. *Utah*, No. 78–1522 (May 19, 1980), slip op. 6–7.[13] But it did not follow that such post-statehood recognition of unceded Indian lands as a Reservation would have retroactive effect so as to divest the State of title to navigable water bottoms, a title inuring immediately upon admission by the force of the Constitution itself. See *State Land Board* v. *Corvallis Sand & Gravel Co.*, 429 U.S. 363, 372–374 (1977).

Looking to what had occurred before Minnesota became a state in 1858, the *Holt* Court concluded that in the treaties preceding statehood there had been, with respect to the Red Lake area—unlike other areas—"no formal setting apart of what was not ceded, nor any affirmative declaration of the rights of the Indians therein." 270 U.S. at 58. That is, of course, correct. The historic fact is that, as of 1858, the United States had never formally recognized the title of the Chippewas to the Red Lake area.

The only two pre-statehood treaties arguably relevant to the question cannot be stretched so far, however generously they are construed in favor of the Indians. The first of these is the Treaty of Aug. 19, 1825 (7 Stat. 272, 2 Kappler 250), designed to end warring, *inter alia*, between the Chippewas and the Sioux, which set a boundary between their respective "countries" (Art. 5), and also between the Chippewas and the Winnebagoes (Arts. 6, 7).[14]

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[13] Indeed, in distinguishing *Beecher* v. *Wetherby*, 95 U.S. 517 (1877) and invoking *United States* v. *Thomas*, 151 U.S. 577 (1894), the Court in *Minnesota* v. *Hitchcock* seems to be holding that even unrecognized Indian title will defeat the grant of a school section in place so long as actual occupation by the Indians is maintained with the acquiescence of the United States. 185 U.S. at 392–393, 396–398, 401–402. See, also, *Gaines* v. *Nicholson*, 50 U.S. (9 How.) 356, 364 (1850); *Wisconsin* v. *Hitchcock*, 201 U.S. 202 (1906).

[14] There is, also, a full boundary description for the "country secured" to the "tribes of the Illinois," including a Chippewa band (Art.

But these lines of demarcation, at least 200 miles to the south and east, obviously cannot be taken to confirm the Chippewa title to the area embracing Red Lake and Mud Lake. The same remark applies to another treaty with the Chippewas, concluded July 29, 1837 (7 Stat. 536, 2 Kappler 491). In describing the extensive cession to the United States (Art. 1), there are references to "the line dividing the territories of the Chippewas and Menomonies," "the southern boundary of the Chippewa country," and "the boundary line dividing it from that of the Sioux." Again, however, the boundaries described are far removed from Mud Lake and there is no indication that that area was deemed included in the "Chippewa country." See Royce, *supra*, pls. CXL, CLXXI, Area 242.[15]

There were, to be sure, two further pre-statehood treaties, concluded on September 30, 1854 (10 Stat. 1109, 2 Kappler 648) and February 22, 1855 (10 Stat. 1165, 2 Kappler 685), by which the Chippewas ceded large areas south and east of Red Lake (see Royce, *supra*, pl. CXL, Areas 332, 357). But these are even less instructive with respect to the area involved in *Holt Bank*. There is barely a refer-

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9). But this district, mainly in the present State of Illinois, is wholly remote from the area involved in *Holt Bank*.

[15] Earlier treaties with the Chippewas affected only lands in Ohio and Michigan. See Treaty of July 4, 1805 (7 Stat. 87, 2 Kappler 77); Treaty of Nov. 17, 1807 (7 Stat. 105, 2 Kappler 92); Treaty of Sept. 29, 1817 (7 Stat. 160, 2 Kappler 145); Treaty of Sept. 24, 1819 (7 Stat. 203, 2 Kappler 185); Treaty of June 16, 1820 (7 Stat. 206, 2 Kappler 187); Treaty of July 6, 1820 (7 Stat. 207, 2 Kappler 188); Treaty of Aug. 29, 1821 (7 Stat. 218, 2 Kappler 198). Equally irrelevant are the Treaties of July 29, 1829 (7 Stat. 320, 2 Kappler 297) and of Sept. 26, 1833 (7 Stat. 431, 2 Kappler 402), dealing with lands in Wisconsin and Illinois. And the same is true of the Treaties of Mar. 28, 1836 (7 Stat. 491, 2 Kappler 450), of May 9, 1836 (7 Stat. 503, 2 Kappler 461), and of Jan. 14, 1837 (7 Stat. 528, 2 Kappler 482), again affecting only lands in Michigan; and, also, the Treaty of Oct. 4, 1842 (7 Stat. 591, 2 Kappler 542), affecting lands in Wisconsin and Michigan. Finally, the Treaties of Aug. 2, 1847 (9 Stat. 904, 2 Kappler 567), and of Aug. 21, 1847 (9 Stat. 908, 2 Kappler 569), affecting lands in Minnesota, should be noted. However, they concern only very distant tracts and are wholly silent as to the Red Lake area. See Royce, *supra*, pl. CXL, Areas 268, 269.

ence to what remained Chippewa "country,"[16] and no suggestion that it embraced what later became the Red Lake Reservation. Indeed, the indications are the other way. For it appears that the Chippewas are ceding *all* their lands,[17] except for a number of specific tracts, which are expressly set apart in these treaties for various bands, but do not include the Red Lake area. See 270 U.S. at 58 n. *; Royce, *supra*, pls. CXXXVII, Areas 333, 340; CXL, Areas 358-360, 453, 455-457; CXLI, Areas 338, 339, 354; CLXXII, Areas 334-337, 341, 342.

The upshot is that, as of 1858, there had been no treaty recognition or confirmation of any Chippewa title to the area later known as the Red Lake Reservation. At the earliest, that occurred—and then only by implication—in 1863, when a separate treaty was executed with the Red Lake and Pembina Bands and the United States accepted from them the cession of a territory west of Red Lake. Treaty of Oct. 2, 1863 (13 Stat. 667, 2 Kappler 853). See Royce, *supra*, at 828 and pl. CXL, Areas 445 (ceded), 446 (unceded). Presumably, the *Holt* Court took the view that mere unrecognized "Indian title" could not defeat the State's constitutional claim to navigable water bottoms, effective upon admission to the Union. Such a ruling

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[16] Both treaties (Art. 1 of each) refer to the "southern boundary line of the Chippewa country," but, in each case, the area so bounded is now ceded.

[17] By the 1854 treaty (Art. 1) the Chippewas of Lake Superior relinquished to the Chippewas of Mississippi, "all their interest in and claim to the lands heretofore owned by them in common, lying west of the [cession] boundary line"—a wholly undefined territory. The next year, however, the Chippewas of Mississippi "fully and entirely relinquish[ed] and convey[ed] to the United States, any and all right, title, and interest, of whatsoever nature * * * to any other lands in the Territory of Minnesota or elsewhere" (1855 Treaty, Art. 1). This provision would have extinguished Indian title to the area embracing Red Lake and Mud Lake if the Red Lake Band had been deemed members of "the Chippewas of the Mississippi." Presumably, that band was deemed separate, for they ceded a portion of their lands in Minnesota by a later treaty in 1863. See text, *infra*. It follows that the 1854 and 1855 treaties did not remotely recognize the claim of the Red Lake Chippewas to the area involved in *Holt Bank*.

plainly does not control the situation in which, before statehood, the United States, by formal treaty, expressly sets apart an area for a particular Tribe of Indians, defining boundaries which include navigable waters. In sum, the *Holt Bank* decision is irrelevant to the present case.

4. It remains only to apply the controlling principles to the present case. That is quickly done.

a. The title of the Crow to an area that encompasses the Big Horn River was first recognized by the United States in the First Treaty of Fort Laramie, concluded September 17, 1851 (11 Stat. 749, 2 Kappler 594, Pet. App. 83–87). At that time, the Crow lands were largely surrounded by "territories" confirmed to other Tribes: the Sioux to the southeast, the Blackfeet to the west and north, the Assinaboin to the northeast and the Gros Ventre, Mandans and Arrickaras to the east. Art. 5; see Royce, *supra*, pls. CXVIII, CXLVI, CLXXIII, Areas 300, 398, 399, 517, 529, 619, 620, 635; and see Appendix, *infra*. If a question had then arisen as to the ownership of the beds of the boundary rivers dividing these "territories" and entirely within recognized "Indian country"—the Yellowstone, the Musselshell and the Powder—presumably the same answer would have been given as in *Choctaw Nation* v. *Oklahoma*, *supra*, 397 U.S. at 628, 634-635. *A fortiori*, one would suppose, the bed of the Big Horn River, entirely within the area confirmed to the Crow, and so much of the Yellowstone River as was also wholly within their boundaries, would have been conceded to that Tribe.

Indeed, that understanding was confirmed, with respect to the Yellowstone River, when, in later years, the Tribe ceded to the United States much of its former territory. By the Treaty of May 7, 1868 (15 Stat. 649, 2 Kappler 1008, Pet. App. 88–96), the new northern boundary of the Crow Reservation was fixed along "the mid-channel of the Yellowstone river" (Art. 2). Since the Tribe gained no new territory by this agreement, it is apparent that both parties considered the bed of the Yellowstone River, so far as within the 1851 boundaries, as belonging to the Crow, and that they were now ceding half of it and retaining the

other half. Indeed, that construction is reflected in two further cessions, one shortly before and one shortly after Montana became a State in 1889. See Act of Apr. 11, 1882, ch. 74, 22 Stat. 42; Act of Mar. 3, 1891, ch. 543, 26 Stat. 989, 1039–1040. In each case, the Crow were relinquishing lands along the Yellowstone and the description expressly sets the northern boundary of the cession at the "mid-channel" of that river, thereby indicating that the Tribe had retained half the bed in 1868.[18]

Obviously, the same principle, applied to the Big Horn, requires the conclusion that the Tribe held the bed of that lesser river and retained the stretch within the diminished Reservation. As it happens, moreover, that result also is expressly confirmed in a later transaction. The 1891 cession just mentioned was, in part, bounded on the east by the Big Horn River (see Appendix, *infra*) and, once again, that boundary is described as "the mid-channel of said river." Act of Mar. 3, 1891, 26 Stat. 1040. That language can only mean that the bed of the river was held by the Crow, half of which they were now ceding in the affected stretch, retaining the other half there and the whole of the bed where it remained surrounded by their lands.[19]

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[18] The remaining Crow lands along the Yellowstone were relinquished by the Act of Apr. 27, 1904, ch. 1624, 33 Stat. 352, ratifying and amending an agreement of August 14, 1899. See Appendix, *infra*. Here, the western and northern limits of the cession are merely referred to as "the present boundary of said reservation." Art. I of the Agreement, reproduced in the Act. This is, of course, wholly consistent with the previous definition of the northern boundary as reaching to the mid-channel of the Yellowstone River.

Although it was rescinded six months later (1 Kappler 857), we should also note an Executive Order of October 20, 1875 (1 Kappler 857), restoring to the Reservation a 20-mile strip north of the Yellowstone River (ceded in 1868). It defined the southern boundary of the addition as the "mid-channel" of that river, presumably on the understanding that the southern half of the Yellowstone remained part of the Reservation. See Royce, *supra*, at 882–883, pl. CXLVII, Area 585.

[19] There is nothing inconsistent in a later cession of a small tract, including the present site of the Town of Hardin, which fixes the eastern boundary of the grant "along the west meander line of the said Big Horn River." Act of Aug. 31, 1937, ch. 890, 50 Stat. 884. Presumably, at that point, the Crow retained the whole bed.

These descriptions leave no room for doubt that both the United States and the Crow at all times considered the bed of the Big Horn River part of the original territory confirmed to that Tribe. Nor is there any question here that the tribal title to the lands encompassing that bed was effectively recognized before Montana was admitted to the Union in 1889.

b. Both the Court of Claims and the Ninth Circuit have construed the Treaty of Fort Laramie of 1851 as governmental recognition of Crow title to the area there defined as their territory, which includes the entire stretch of the Big Horn River. *Crow Tribe* v. *United States*, 284 F.2d 361, 371 (Ct. Cl. 1960); *United States* v. *Finch*, *supra*, 548 F.2d at 829–830, Pet. App. 70–71. Thereafter, the Territory of Montana was created in 1864, and the Organic Act expressly safeguarded the personal and property rights of the Indians so long as "unextinguished by treaty between the United States and such Indians." Act of May 26, 1864, ch. 95, Section 1, 13 Stat. 85, 86, II J.A. 29, 30. See, also, Section 17 of the same Act, 13 Stat. 91–92, II J.A. 43–44. This would seem fully sufficient to protect the Crow lands recognized by the Treaty of 1851. But there is, in fact, much more.

Whatever the effect of the Treaty of 1851, the Crow Reservation was formally established by the Treaty of 1868. By that agreement, the territory described was solemnly "set apart for the absolute and undisturbed use and occupation" of the Crow (Art. 2, Pet. App. 89), as their "permanent home" (Art. 4, Pet. App. 90), the United States further promising that, except for government agents and such other Indians as the Tribe might admit, "no persons * * * shall ever be permitted to pass over, settle upon, or reside in" the Reservation (Art. 2, Pet. App. 89–90). No more formal recognition of the Crow's exclusive rights within defined boundaries could be wanted. Plainly, these stipulations repel any notion that the future State of Montana, or its lessees, would be free to exploit the bed of the Big Horn River in the heart of the Crow Reservation. That bed was no part of what was ceded;

presumptively, it was retained. Cf. *United States* v. *Winans*, 198 U.S. 371, 381 (1905). This was surely the understanding when Montana was admitted to the Union in 1889, on the condition it "forever disclaim all right and title * * * to all lands lying within [its] limits owned or held by any Indian or Indian tribes * * * until the [Indian] title thereto shall have been extinguished by the United States." Act of Feb. 22, 1889, ch. 180, Section 4, 25 Stat. 676, 677, App. to Pet. Br. 13–14.

c. To be sure, in later years, in consequence of the General Allotment Act of 1887, ch. 119, 24 Stat. 388 (Pet. App. 97–104) and the Crow Allotment Act of 1920, ch. 224, 41 Stat. 751 (Pet. App. 105–118), many tracts within the Reservation, originally allotted to members of the Tribe, were alienated to non-Indians, and a number are now held by the State of Montana. So, also, Section 16 of the Crow Allotment Act (41 Stat. 756–757, Pet. App. 117) granted school sections to the State, albeit the minerals were reserved to the Tribe. But it is not suggested that any of these alienated parcels included the bed of the Big Horn River. Nor is it remotely arguable that the Reservation was thereby disestablished or diminished. In these circumstances, it cannot be assumed that the Tribe, by some silent and imperceptible process, lost its title to the riverbed.[20] Congress might have abrogated the treaties of 1851 and 1868 in this respect. But a clearer purpose to do so would be required. Cf. *Washington* v. *Fishing Vessel Ass'n*, *supra*, 443 U.S. at 690. As we have noted, the only indication of congressional intent is to the contrary: in 1891, after the enactment of the General Allotment Act, and after Montana had become a State, Congress treated

[20] The situation here is wholly unlike that in *Puyallup Tribe* v. *Washington Game Dept.*, *supra*. There, the Court suggested that the Reservation had been disestablished, or at least diminished to 22 acres (433 U.S. at 173–174 & n.11), whereas, here, no such suggestion is made and some 70% of the land remains in Indian ownership. See page 3, *supra*. Moreover, in *Puyallup*, the Court stressed that all tracts riparian to the river had been alienated (433 U.S. at 174), and it may have assumed that those tracts extended to the middle of the stream, as would be the normal rule if the river is non-navigable.

the bed of the Big Horn River as still owned by the Crow Tribe.

We conclude that the Crow Tribe retains half the bed of the Big Horn where it now defines the Reservation boundary and the whole of that bed to the north where it traverses their diminished territory.

II. THE BANKS OF THE BIG HORN RIVER

The question who owns the banks of the Big Horn River—the area between low and high water mark—is one of doubtful practical importance in this case, if only because Yellowtail Dam has substantially regularized the flow of the river. Nevertheless, petitioners have vigorously maintained that the riparian upland proprietors (presumably including Crow allottees and the Tribe itself) own to low water mark. Although both courts below decided otherwise, the issue is again presented by the petition for certiorari.[21] Accordingly, we address it, albeit briefly.

As we understand it, the argument advanced by petitioners is that the law of Montana governs the question, regardless whether the bed of the river is held by the United States in trust for the Tribe or by the State. We disagree. In our view, if the bed and banks of the navigable Big Horn River had inured to Montana upon its admission to the Union—as would be the case had they not previously been reserved for the Tribe—the State would, of course, have been free to grant the banks to riparian owners, whether by special deed or by general statute. But if, on the contrary, the United States withheld the bed and banks for the benefit of the Tribe—as we maintain (Point I, *supra*)—Montana can no more appropriate the banks to itself, or give them to others, than it can usurp or alienate other federal or tribal lands.

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[21] We assume the question is properly here because the court of appeals, although denying rehearing, expressly considered and decided it on Montana's application. Pet. App. 24-26. But for that circumstance, the issue might be foreclosed by the failure of petitioners to appeal the district court's ruling that the bed and banks must be deemed in the same ownership. See Pet. App. 40-45, 54; Pet. 17.

1. The predicate of our submission is that, before statehood, the United States effectively reserved for the Crow Tribe the bed and banks of the Big Horn River. We appreciate that petitioners dispute whether any such reservation of the riverbed occurred. But, assuming there was an effective reservation, we are not aware that any party challenges that it embraced both the banks and the bed. On the contrary, it is clear that if it does not own the bed, the State is only claiming the banks where it is the upland proprietor by virtue of later federal patents, not as sovereign lands inuring to Montana upon admission to the Union. The common assumption of all litigants and of both courts below is that if the Treaty of 1851 or 1868 withheld the bed of the Big Horn from the future State, the banks to high water mark were likewise withheld. Indeed, any other view would be absurd, since the banks would then have passed to the State under the rule of *Pollard's Lessee* v. *Hagan*, 44 U.S. (3 How.) 212 (1845), and its progeny,[22] creating an anomaly wholly at odds with the purpose of reserving the bed itself to the Tribe.[23]

In sum, there are only two possibilities: either the bed *and* banks of the Big Horn River were reserved to the Tribe before statehood, or *both* passed to Montana in 1889. The only question is whether, in the first hypothesis, the banks somehow later became severed from the tribal bed, held in trust by the United States.

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[22] From *Pollard's Lessee* v. *Hagan*, *supra*, 44 U.S. (3 How.) at 229–230, through *State Land Board* v. *Corvallis Sand & Gravel Co.*, *supra*, 429 U.S. at 374, 375, 376, it has always been clear that unless previously reserved or alienated, the "shores" or "banks" of navigable waters, to high water mark, pass to the State upon its admission to the Union. The Equal Footing Doctrine of course applies the same rule to all States—albeit we assume nothing prevents any State from returning a part of the grant.

[23] In theory, the State could have cured the anomaly by disclaiming the benefit of the constitutional grant of the banks in favor of the Tribe. But the parties to the Treaties of 1851 and 1868 would hardly have relied on such unusual prospective action by a future State, whose laws could not be known, when deciding whether to include the banks in the area reserved. Besides, Montana could not so act until it became a State in 1889 and, in the meantime, the banks would have been excluded from the Crow Reservation and left open to intruders.

2. We do not know whether petitioners claim the State could have accomplished this result unilaterally, simply by adopting as a rule of property law that upland riparian proprietors along navigable streams own to low water mark. At all events, we deem the answer obvious. If a State can thus appropriate the banks, notwithstanding they were reserved by the United States for an Indian Tribe, there is no principled stopping place. Why should not the State be equally free to confer on the riparian owner the bed itself, to the middle of the stream? So far as we are aware, no decision by this or any other Court concedes the power of a State to take or alienate reserved lands of the United States, or tribal lands, except as expressly authorized by Congress. Cf. *United States* v. *Oregon*, 295 U.S. 1, 26-29 (1935).

Certainly, nothing in *State Land Board* v. *Corvallis Sand & Gravel Co.*, *supra*, or *Wilson* v. *Omaha Indian Tribe*, 442 U.S. 653 (1979), condones such a result. Those decisions permit State law to determine the effect of physical changes in a riverbed. But they do not remotely suggest that local law can vary an "initial boundary" fixed by federal act when neither man nor nature has intervened to alter the position of the line relative to a body of water. See, *e.g.*, 429 U.S. at 370, 376; 442 U.S. at 673.

Nor is this a case in which it is reasonable to adopt State law as the federal rule. We deal here, not (as in *Wilson*) with lands on the edge of a Reservation, but with riverbanks in the heart of what remains unquestionably "Indian country." In most respects, State law has no business there. See *DeCoteau* v. *District County Court*, 420 U.S. 425, 427 n.2 (1975). Certainly, it is wholly inappropriate to invoke the riparian property rules of Montana to resolve any dispute over riverbanks between the Tribe and Crow allottees who still hold riparian lands. Yet, to apply that law only when those tracts are transferred to non-Indians or to the State would create awkward anomalies. What is more, the alienated tracts may return to Indian ownership. See 25 U.S.C. 463e, 465. Here, plainly, a uniform federal rule is called for.

3. Petitioners, it seems, recognize the obstacle and place their reliance on the federal patents, asserting that, in the absence of an expressed intent to the contrary, the extent of the rights thereby conferred ought to be judged according to State law. That, indeed, has been held with respect to grants abutting *non*-navigable streams, where the United States "completely part[s] with its territory." *E.g.*, *Oklahoma* v. *Texas*, 258 U.S. 574, 594–595 (1922), as explained in *Wilson* v. *Omaha Indian Tribe*, *supra*, 442 U.S. at 671 n.18. But, in the case of federal patents conveying uplands adjacent to a *navigable* body of water, the general rule is that no part of the bed or banks is included, because these usually belong to the State or are held in trust for a future State. See, *e.g.*, *Shively* v. *Bowlby*, *supra*, 152 U.S. at 48–57. The same presumption, we submit, applies when the bed and banks are held in trust for an Indian Tribe.

No doubt, the United States has the power to alienate tribal lands, although in derogation of treaty obligations. But only the plainest indication of an intent to do so will work such a defeasance, even when the initial beneficiaries would be individual members of the Tribe. See *Northern Cheyenne Tribe* v. *Hollowbreast*, 425 U.S. 649, 655–656 (1976). There is nothing of the kind here.

As we have already noted, neither the General Allotment Act of 1887 nor the Crow Allotment Act of 1920 can be read as relinquishing tribal ownership of the bed of the Big Horn River. There is no better reason to construe those enactments as affecting the river banks, whether directly or by requiring the banks to be included in allotments of riparian uplands. Cf. *Montana Power Co.* v. *Rochester*, *supra*, 127 F.2d at 192. On the contrary, the 1920 Act expressly reserves from allotment a large mountainous area abutting the Big Horn River in the southeastern portion of the Reservation (Section 1, 41 Stat. 751, Pet. App. 105; see Pet. Br. 6 n.12), as well as "lands * * * chiefly valuable for the development of water power" (Section 10, 41 Stat. 754, Pet. App. 112), which obviously included some portion of the river banks. And neither the

trust patents nor the fee patents make any reference to lands below high water mark. In these circumstances, it would be wholly wrong to construe these instruments—contrary to the usual rule—as encompassing the adjacent river banks.

III. HUNTING AND FISHING WITHIN THE RESERVATION

As petitioners themselves stress (Pet. Br. 30), only very narrow issues are presented with respect to hunting and fishing on the Crow Reservation. There is no question about the right of tribal members to hunt and fish anywhere within the Reservation, exempt from State regulation. It appears to be conceded that the Crow may freely hunt and fish on State-owned land, including the Big Horn River even if the bed belongs to Montana. No issue arises as to the right of the Indians to hunt and fish on privately held non-Indian tracts, no doubt because the Crow have never pressed any claim to ignore fencing or posting by individual proprietors. Of course, the Tribe, if need be, would assert a right to cross private land to gain access to hunting and fishing grounds (see *United States* v. *Winans*, *supra*), but no dispute in that respect is presented here. The State claims no right to require licenses of tribal members or otherwise to regulate their hunting and fishing,[24] and, on the other hand, fully concedes the Tribe's authority to control the activities of its members.

The only controversy before this Court concerns hunting and fishing by non-members within the boundaries of the Crow Reservation. Even then, the dispute is limited. The State (and the other petitioners) do not challenge the Tribe's absolute authority to prohibit, or to license and regulate, non-member hunting and fishing on Indian lands, whether held tribally or individually. The only question arises as to hunting and fishing by non-members on Reservation lands owned in fee by non-Indians or by the

[24] There is no suggestion here that tribal activities on the Reservation threaten the survival of any migrating species, a situation that might justify State intervention. See *Washington* v. *Fishing Vessel Ass'n*, *supra*, 443 U.S. at 683-684.

State, presumably including the bed of the Big Horn River and its banks where adjacent to non-Indian tracts, under petitioners' claim that these are not tribally owned (see Points I and II, *supra*). Here, the State asserts that it enjoys exclusive control over non-Indian activities, disputing the ruling below that the Tribe may wholly exclude non-residents from these areas and may regulate resident non-Indians hunting and fishing on fee lands to a limited degree. On the other hand, the United States and the Crow Tribe, having accepted the decision of the court of appeals, no longer challenge the right of non-member residents to hunt and fish on their own lands, subject only to non-discriminatory and reasonable tribal regulation. Nor do we here dispute the State's power to impose regulations more restrictive than the Tribe's on non-member hunting and fishing.[25]

The upshot is that, except for minor quibbles, the only substantial questions presented to this Court with respect to hunting and fishing are: (1) whether the Crow Tribe may exclude—or admit on such conditions as it chooses—outsiders who do not live on the Reservation; and (2) whether the Tribe may prohibit non-member residents from hunting or fishing within the Reservation on fee lands other than their own. These issues could arise if non-Indian landowners sought to commercialize hunting and fishing on their lands. Today, however, the problem centers on the fishery of the Big Horn River, where the State, claiming ownership of the bed and some of the banks, has permitted non-member residents and, more importantly, a large non-resident population, to exploit the resource—an issue which is mooted, we stress, if the Tribe owns the bed and banks, as we assert.[26]

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[25] Because the ruling below essentially protected the hunting and fishing rights of the Crow Tribe within its Reservation and vindicated its authority to exclude strangers, we determined not to seek review here. It does not, of course, follow that the United States (or the Tribe) views the decision of the court of appeals as correct in every particular.

[26] We note that Petitioners' Brief never explicitly refers to outsiders. On the contrary, petitioners repeatedly stress that "Montana law con-

Although they have a common source and substantially overlap, there are two distinct aspects to the Tribe's claim. The first is the special privilege of the members to hunt and fish within a defined area: essentially a *property right*, albeit not necessarily tied to land ownership. Originally exclusive, this privilege is sometimes required to be shared with others, to one degree or another. The principal question here—which we first address—is whether that happened in the case of areas still within the Crow Reservation. Only to the extent that an affirmative answer is given, does the second question arise: what authority does the Tribe retain, as a sovereign government, to *regulate* non-member hunting and fishing within the Reservation. We discuss that issue in due course.

A. The Tribal Property Right

1. Petitioners rightly concede that the Treaty of 1868 conferred on the members of the Crow Tribe the "exclusive use of their reservation" (Pet. Br. 31), which included the right to exclude all non-members from entering, whether for hunting or fishing or any other purpose. At all events, the terms of the reaty, read in light of this Court's precedents, leave no room for argument on that score. See, *e.g.*, *United States* v. *Winans*, *supra*, 198 U.S. at 381; *Alaska Pacific Fisheries* v. *United States*, *supra*, 248 U.S. at 89–90; *Menominee Tribe* v. *United States*, 391 U.S. 404, 406 (1968); *Washington* v. *Fishing Vessel Ass'n*, *supra*, 443 U.S. at 683–684. See, also,

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fers upon landowners exclusive hunting and fishing rights," which constitute "a property right," "attached to the fee" and "appurtenant to the ownership of such lands" (Pet. Br. 32, 35, 39). The brief goes on to assail the tribal ordinance because "it deprives non-members of the right to exercise hunting and fishing privileges on their own land" (Pet. Br. 36). This, of course, is no longer an issue in the case, except only with respect to non-resident landowners (see Pet. Br. 39–40). Never do petitioners mention hunting and fishing on State-owned lands, or on the Big Horn River. Nevertheless, given the genesis of this suit, the elaborate argument advanced as to State ownership of the river-bed, and the participation of the Big Horn Rod & Gun Club as a petitioner, we must assume that petitioners *are* asserting a right on behalf of outsiders (neither residents nor landowners) to hunt and fish in non-Indian areas of the Reservation.

United States v. *Sturgeon*, 27 F. Cas. 1357 (D. Nev. 1879); *Mason* v. *Sams*, 5 F.2d 255, 257 (W.D. Wash. 1925). The only open question is whether, and to what extent, the exclusive right of tribal members to hunt and fish within the boundaries of their diminished Reservation has been diluted by subsequent events, notably, the alienation of tracts to non-members and to the State.

For good reason, petitioners do not claim that these alienated parcels are no longer part of the Reservation or that State jurisdiction has replaced federal and tribal authority there. See 18 U.S.C. 1151; *Seymour* v. *Superintendent*, 368 U.S. 351 (1962); *Mattz* v. *Arnett*, 412 U.S. 481 (1973); *United States* v. *Mazurie*, 419 U.S. 544, 554–555 (1975); *DeCoteau* v. *District County Court*, *supra*, 420 U.S. at 427 n.2; *Moe* v. *Salish & Kootenai Tribes*, 425 U.S. 463, 477–479 (1976). But petitioners *do* assert that, because "Indian title was extinguished" as to the alienated tracts, any tribal claim to enjoy special hunting and fishing rights there, or to regulate hunting and fishing by non-members, has likewise ceased (Pet. Br. 31–32). That is the point of disagreement.

2. The fundamental flaw in petitioners' argument is their insistence that the tribal right to hunt and fish is necessarily dependent on land ownership. Even in the traditional common law, there is no such rule. See, *e.g.*, *Malcomson* v. *O'Dea*, 10 H.L. Cas. 593, 617–618 (1863). And, at all events, it is familiar history that Indian Tribes often retained special hunting or fishing rights, or both, on lands they ceded altogether. See, *e.g.*, *United States* v. *Winans*, *supra*; *Kennedy* v. *Becker*, 241 U.S. 556 (1916); *Seufert Bros. Co.* v. *United States*, 249 U.S. 194 (1919); *Tulee* v. *Washington*, 315 U.S. 681 (1942); *Puyallup Tribe* v. *Department of Game of Washington*, 391 U.S. 392 (1968); *Washington Game Dept.* v. *Puyallup Tribe*, 414 U.S. 44 (1973); *Antoine* v. *Washington*, 420 U.S. 194 (1975); *Washington* v. *Fishing Vessel Ass'n*, *supra*. See, also, *Menominee Tribe* v. *United States*, 391 U.S. 404 (1968). Obviously, if tribal hunting and fishing privileges can survive the total severance of the underlying lands from Indian jurisdiction, there is nothing incongruous in

the suggestion that a Tribe retained such rights in unceded areas, still within Reservation boundaries, albeit now owned by non-Indians.

We do not suggest that the off-Reservation cases resolve the present controversy. But they do make clear that the Indian right to hunt and fish is not a private landowner's privilege. The right is tribal, not individual, and every member shares it, regardless whether he owns any portion of the affected land. See, *e.g.*, *Washington* v. *Fishing Vessel Ass'n*, *supra*, 443 U.S. at 679. What is more, these decisions entirely reject the idea that State property law rules, or even the terms of a federal patent, govern the question. See, *e.g.*, *United States* v. *Winans*, *supra*, 198 U.S. at 382–384. The only relevant inquiry is whether, when the land status changed, the Tribe relinquished its former hunting or fishing rights there. That is a matter to be decided according to the familiar canons of construction in Indian cases, under which the abrogation of treaty rights is never presumed. See *Menominee Tribe* v. *United States*, *supra*, 391 U.S. at 412–413; *Washington* v. *Fishing Vessel Ass'n*, *supra*, 443 U.S. at 690. All the more so in respect of hunting and fishing privileges, so vital to the traditional Indian way of life that Congress has been zealous to preserve them even in its most "assimilationist" periods. See Act of Aug. 15, 1953, ch. 505, Section 2, 67 Stat. 588, 18 U.S.C. 1162(b); 25 U.S.C. 1321(b).

3. Petitioners argue that the Tribe's previously exclusive right to hunt and fish throughout the Reservation became "diluted" in consequence of the allotment policy of the United States (Pet. Br. 31). But they are unable to point to any specific provision of law that accomplished that result. Nor are they clear precisely *when* the alleged dilution occurred. Does it date from the Treaty of 1868 itself, which (as petitioners correctly note, see Pet. Br. 31 n.46) provided for individual allotments (Art. 6, 15 Stat. 650–651, Pet. App. 91–92)? Or from the enactment of the General Allotment Act of 1887, or the Crow Allotment Act of 1920? Or from the actual allotment of tracts to members

of the Tribe under one or the other statute? Or from the alienation of any such tract from the Crow allottee to a non-member or to the State? No answer is satisfactory and each presents special difficulties.

We need only consider the last possibility, seemingly favored by petitioners. It is settled that, notwithstanding Section 6 of the General Allotment Act of 1887 (24 Stat. 390, Pet. App. 102–103), the issuance of a patent in fee to an Indian does not extinguish the special privileges he enjoys as a member of the Tribe residing within Reservation boundaries—including immunity from State taxation and exemption from State law. *Moe* v. *Salish & Kootenai Tribes*, *supra*, 425 U.S. at 477–479, and cases there cited. The rationale is that the allotment policy has long since been "repudiated" and that "Congress by its more modern legislation has evinced a clear intent to eschew any such 'checkerboard' approach within an existing Indian reservation." *Id.* at 479; see 18 U.S.C. 1151. By a parity of reasoning, we cannot assume that such tracts are henceforth removed from tribal authority or wholly closed to the exercise of communal tribal hunting and fishing rights—except as such activities are plainly inconsistent with the residential or agricultural uses to which discrete parcels are devoted. If this is so, it is difficult to appreciate how the mere conveyance of a "fee" tract to a non-member alters the situation, when nothing in either the 1887 Act or the 1920 Act distinguishes between Indian and non-Indian ownership of such lands.

At this day, and especially in respect of tribal hunting and fishing rights, it would be wrong to carry further than the text requires provisions of law as to which Congress itself has confessed error. As the Ninth Circuit observed in *Santa Rosa Band of Indians* v. *Kings County*, 532 F.2d 655, 663 (1975), in language quoted with approval in *Bryan* v. *Itasca County*, 426 U.S. 373, 389 n.14 (1976), courts "are not obliged in ambiguous instances to strain to implement [an assimilationist] policy Congress has now rejected, particularly where to do so will interfere with the present congressional approach to what is, after all, an

ongoing relationship." The correct conclusion, we submit, was given by the Montana Supreme Court in the case of another Indian Reservation in the State with a comparable history (*State* v. *McClure*, 127 Mont. 534, 547–548, 268 P.2d 629, 635 (1954)):

> The exclusive right, acknowledged by the treaty, of hunting and fishing in and upon the lands and waters within the exterior boundaries of the Flathead Indian Reservation, imposed a servitude and easement upon every piece of land therein as though specifically described. The future ownership of the lands thereof was well foreseen and provided for.
>
> The Indians retained a right in the land, the right of hunting thereon. The right was intended to be a continuing one against the United States and its grantees as well as against the state and its grantees. No other conclusion would give effect to the treaty. Compare United States v. Winans, supra. It is our opinion that the rights reserved of hunting and fishing upon any and all lands and waters within the exterior boundaries of the Flathead Indian Reservation, by the treaty of July 16, 1855, 12 Stat. 975, have never been alienated, [and] still exist unimpaired * * *.[27]

4. Notwithstanding these difficulties, the court of appeals deemed it appropriate to construe the Allotment Acts as impliedly promising the white settler who purchased land within the Reservation that "bagging of game from his front step [would not be] subject to permission of the Crow Tribal Council" (Pet. App. 15). For the purposes of this case, we accept that ruling as a permissible accommodation. But, in our view, it would be wholly unwarranted to expand this limited exception to other non-Indian areas on the Reservation, or to non-residents who can claim no "justifiable expectations" to participate in Reservation resources (*Rosebud Sioux Tribe* v. *Kneip*, 430 U.S. 584, 605 (1977)). Certainly, one who has no connection with the Reservation can assert no right in law or

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[27] See Hobbs, *Indian Hunting and Fishing Rights II*, 37 Geo. Wash. L. Rev. 1251, 1269–1270 (1969).

equity to hunt and fish there simply because, as it happens, some Crow allottees sold their lands to non-Indians. Nor should access be afforded to all comers because the State has purchased a "wedge" within the Reservation boundaries. The hunting and fishing rights of the Crow Tribe cannot so easily "be manipulated out of existence" (*Frost & Frost Trucking Co.* v. *R.R. Comm'n of California*, 271 U.S. 583, 594 (1926)).

5. Finally, we note that the claim of non-members—and especially outsiders—to participate in the Big Horn River fishery is weaker still. If (contrary to our submission) the bed of that river belongs to the State, it is by virtue of the Constitution, not as a consequence of any action of Congress or any purchase by the State. The allotment policy has no bearing on the question. To be sure, the mineral resources of the bed, if any, would be subject to exploitation by the State, under appropriate regulation. But it by no means follows that the fishery in the overlying waters would be open to all citizens. If the United States did not reserve the bed of the Big Horn for the benefit of the Crow, it did, at the least, protect them from the invasion of thousands of fishermen into the heart of their territory. The "solemn[ ]" promise given in 1868 to permit "no persons * * * to enter * * * [or] to pass over" the Reservation territory (Art. 2, 15 Stat. 650, Pet. App. 89) cannot have been so substantially withdrawn *sub silentio* in 1889 when Montana became a State. Nor can those who later purchased tracts within the Reservation, pursuant to the General Allotment Act passed two years earlier, legitimately say that they were promised a share in the river fishery not then, on any theory, held by the State.

B. The Tribal Power of Regulation

Insofar as the Crow enjoy exclusive hunting and fishing rights within the Reservation, Resolution No. 74-05 (Oct. 13, 1973) (Pet. App. 119-120) merely reflects their decision to keep their property to themselves. It serves the same function as a landowner's "posting," notifying all comers that the Tribe does not acquiesce in any trespass

on its rights. Obviously, there is in that no exercise of governmental power over non-members, and neither the Fifth Amendment nor the Indian Civil Rights Act is implicated (see Pet. Br. 36–41). To the extent, however, that the Crow are held no longer to possess exclusive rights as "property," the question arises how far the Tribe may regulate hunting and fishing within the Reservation as the sovereign of that territory.

1. It is unnecessary, at this date, to demonstrate that Indian Tribes retain a measure of sovereignty over their Reservations, including non-Indian activities there. The modern view was announced in *Williams* v. *Lee*, 358 U.S. 217, 223 (1959), and has been consistently reiterated. *E.g.*, *Warren Trading Post Co.* v. *Arizona Tax Comm'n*, 380 U.S. 685, 690–692 (1965); *United States* v. *Mazurie*, 419 U.S. 544, 558 (1975); *United States* v. *Wheeler*, 435 U.S. 313, 323 (1978); *Santa Clara Pueblo* v. *Martinez*, 436 U.S. 49, 65–66 (1978); *Washington* v. *Confederated Tribes of the Colville Indian Reservation*, No. 78–630 (June 10, 1980), slip op. 15–17; *White Mountain Apache Tribe* v. *Bracker*, No. 78–1177 (June 27, 1980), slip op. 5–6, 14. It can hardly be doubted that this governmental authority of the Tribes over "their territory" reaches on-Reservation hunting and fishing, traditionally the most vital area of concern and clearly a subject matter in which the Tribe has "a significant interest," whether the activity occurs on Indian-held land or a neighboring tract. See *Washington* v. *Confederated Tribes of the Colville Indian Reservation*, *supra*, slip op. 16, citing with approval *Buster* v. *Wright*, 135 F. 947 (8th Cir. 1905), appeal dismissed, 203 U.S. 599 (1906).

It does not, of course, follow that Indian Tribes are wholly unrestrained when acting in their governmental capacity over non-members, or lands or property interests held by others. Thus, the court below held that, exercising regulatory power with respect to hunting and fishing by non-member residents, the Crow Tribe must act reasonably and in a non-discriminatory manner. But, we submit, a different rule applies when a Tribe is seeking to exclude or regulate outsiders who are in no sense "in-

habitants" of the Reservation. As to that aspect of the case, the Tribe, as the government of the territory, has an independent claim to follow an exclusionary policy, or to admit on conditions, which does not turn on the proprietary rights of the members to the resource involved.

2. Historically, Indian Tribes, in their capacity as territorial sovereigns, enjoyed the unusual prerogative of closing their borders to non-members. Except as rights of way have been expressly granted, or as non-members who own land within Reservation boundaries must of course be conceded free ingress and egress to and from their tracts, we know of no basis for altering that rule. Indeed, in *Colville, supra*, slip op. 16, this Court only recently invoked decisions applying the principle. And the same reasoning underlies contemporary rulings by the courts of appeals condoning tribal licensing schemes for outside hunters and fishermen. *Mescalero Apache Tribe* v. *State of New Mexico, et al.*, No. 78–1790 (10th Cir. Aug. 13, 1980); *Eastern Band of Cherokee Indians* v. *North Carolina Wildlife Resources Commission*, 588 F.2d 75 (4th Cir. 1978), petition for cert. dismissed per stipulation, No. 78–1653 (May 22, 1980).

It is inconceivable that this power of excluding intruders can be wholly defeated by the State's purchase of a handful of strategically located Indian allotments. Perhaps the Tribe must tolerate reasonable public uses of State lands within the Reservation. But, unless tribal territorial sovereignty is to become a wholly empty symbol, there must remain authority to say "No hunting or fishing, except by *bona fide* residents or pursuant to special permission." Nor does this amount to impermissible discrimination. Unlike other governments, Indian Tribes are not subject to the strictures of the Constitution. *Talton* v. *Mayes*, 163 U.S. 376 (1896), reaffirmed in *United States* v. *Wheeler, supra*, 435 U.S. at 328–329; and *Santa Clara Pueblo* v. *Martinez, supra*, 436 U.S. at 56, 71. And, as we read it, the Indian Civil Rights Act is satisfied when the Tribe treats alike all persons within the Reservation, and therefore "within its jurisdiction," while preventing entry to outsiders. See 25 U.S.C. 1302(8).

3. Finally, the decision of the Crow Tribal Council to exclude hunting and fishing by outsiders within the Reservation is not without substantial justification in recent experience. The 1973 Resolution, as we have detailed (pages 3–6, *supra*), was enacted against a background of more generous policies which ultimately threatened the fish and game resources of the Reservation. Even a State, subject to the full force of the Privileges and Immunities and Equal Protection Clauses of the Fourteenth Amendment, may take some measures to safeguard the special interest of its citizens in such circumstances. *Baldwin* v. *Montana Fish and Game Comm'n*, 436 U.S. 371 (1978). It would be strange if an Indian Tribe cannot likewise protect its diminished territory, especially "set apart" for the members so that they might preserve their resources and their way of life against the intrusion of the "familiar forces" surrounding them.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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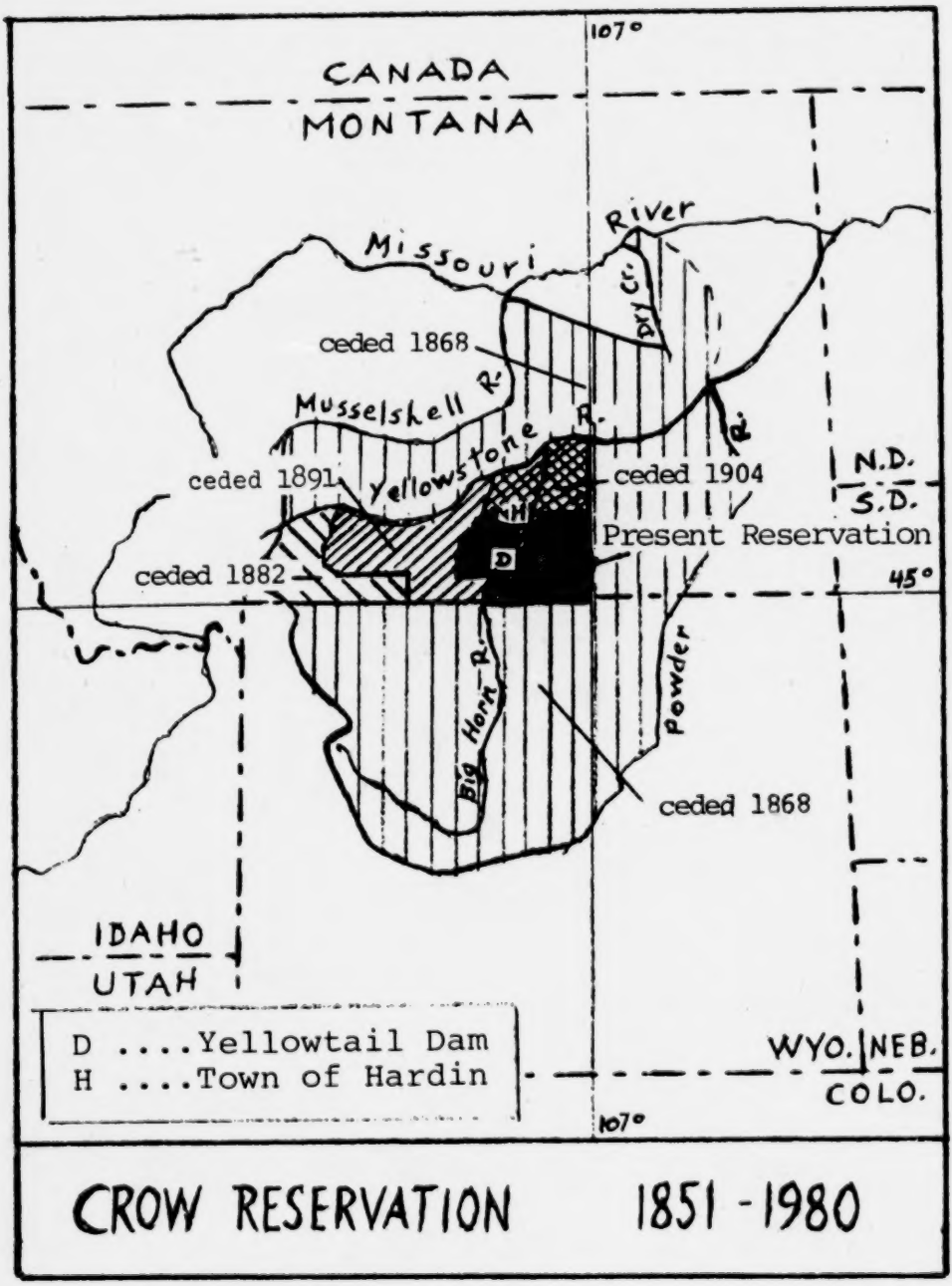
APPENDIX



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